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No. 07-1209

IN THE
Supreme Court of the United States

JAMES B. PEAKE,
Secretary of Veterans Affairs,
Petitioner,
v.
WOODROW F. SANDERS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AMERICAN MILITARY RETIREES ASSOCIATION, NATIONAL VETERANS ORGANIZATION OF AMERICA, NATIONAL DEFENSE COMMITTEE, REAR ADMIRAL (RET.) JAMES J. CAREY, AND VETERANS UNITED FOR TRUTH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Date: October 21, 2008

QUESTION PRESENTED

When the Department of Veterans Affairs denies a claim after failing to provide the notice to a claimant required by 38 U.S.C. § 5103(a) – including notice of any information and any medical or lay evidence not previously provided to the VA that is necessary to substantiate a claim, and notice regarding which portion of the information is to be supplied by the claimant and which portion is to be supplied by the VA – and the VA seeks to avoid a ruling overturning its decision by asserting that its error did not prejudice the claimant, should the VA bear the burden of demonstrating the absence of prejudice?

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a nonprofit, public-interest law and policy center based in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise principles, individual rights, a limited and accountable government, and the proper use of our state and federal administrative systems. To that end, WLF has frequently appeared in this and other federal and state courts to ensure that administrative agencies adhere to the rule of law. *See, e.g., Exxon Mobil Corp. v. Federal Energy Regulatory Comm'n*, No. 08-212 (U.S., petition for cert. filed August 18, 2008).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of

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[1] Pursuant to Supreme Court Rule 37.6, *amici* hereby affirm that no counsel for a party authored any part of this brief, and that no person or entity other than *amici curiae* and their counsel provided financial support for the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The American Military Retirees Association (AMRA) is a nonprofit organization that advocates on behalf of retired military personnel. The AMRA encourages military retirees to band together to protect earned benefits by educating on benefits available and advocating for protection of earned benefits through active monitoring of legislation in the U.S. Congress and the policies and proposals of the Department of Defense and the Department of Veterans Affairs (VA).

The National Veterans Organization of America, Inc. (NVOA) is a nonprofit organization dedicated to the preservation and enhancement of Veterans Benefits. It has more than 5,000 members nationwide, consisting primarily of disabled veterans. A primary focus of NVOA is reducing delays by the VA in processing claims submitted by veterans.

The National Defense Committee is a grass roots, pro-military organization supporting a larger and stronger military and increased participation by veterans in public service. Its Chairman is Rear Admiral (Ret.) James J. Carey. Carey served 33 years in the U.S. Navy and Navy Reserve and later served as Chairman of the Federal Maritime Commission.

Veterans United for Truth, Inc. is a nonprofit organization dedicated to serving the interests of both current military personnel and veterans. Veterans United for Truth works to improve the accession, training, equipping, and commitment of active-duty and reserve force military; to ensure that all persons active,

reserve, and guard are told the truth about the reasons for their commitment to specific conflicts, and the truth about their obligations; to work to ensure that the dependents of all persons on active duty receive services in a timely fashion; and to work for legislation that guarantees benefits to all veterans without undue administrative complexity.

Amici are concerned that the position espoused by the VA in this case, if adopted by the Court, will render meaningless provisions of federal law designed to guarantee that the VA will notify all applicants for veterans benefits regarding what information they need to provide in order to substantiate their claims. Most veterans apply for disability benefits without the assistance of counsel. Congress has recognized that without the assistance of the VA, many such applicants will not know how to marshal necessary evidence to support their claims. Thus, Congress has mandated that the VA provide such assistance. But *amici* fear that if the VA's interpretation of that mandate prevails, the VA will have a reduced incentive to provide the assistance that many veterans so desperately need.

The *amici* have no direct interest, financial or otherwise, in the outcome of this case. They are filing due solely to their interest in the important issues raised by this case.

STATEMENT OF THE CASE

Respondents are two veterans who assert that they are suffering from service-connected disabilities. Their applications for disability benefits have been pending before the VA for many years.

For purposes of this petition, the VA does not contest that it failed to comply with federal law in handling those claims. It failed to comply with a notice provision of the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, which provides as follows:

> **Notice to claimants of required information and evidence**
>
> (a) Required information and evidence. – Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with [38 U.S.C. § 5103A] and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

38 U.S.C. § 5103(a).

The VA ultimately denied Respondents' disability claims. The U.S. Court of Appeals for the Federal Circuit ruled that the VA's failure to comply with its duty under § 5103(a) to provide proper notification to Respondents requires that their claims be re-opened, in the absence of evidence from the VA that Respondents were not prejudiced by the VA's errors. Pet. App. 1a-21a, 56a-64a. The issue before the Court is who – as

between a claimant and the VA – bears the burden of proof regarding prejudice arising from an admitted violation of the § 5103(a) notification requirements.[2]

Respondent Patricia Simmons served on active duty in the U.S. Navy from 1978 to 1980. In 1980, she applied to the VA for disability benefits for hearing loss in her left ear. Although the VA determined that Simmons was suffering from a service-connected disability, it denied her claim on the grounds that the disability was not sufficiently severe to merit compensation. Simmons renewed her claim in 1998, asserting that her hearing loss had gotten worse. When the VA again denied her claim, she appealed to the U.S. Court of Appeals for Veterans Claims (the "Veterans Court").

The Veterans Court agreed with Simmons that the VA had failed to comply with the § 5103(a) notice requirements in her case because the VA had failed to inform her (1) that establishing her claim would require her to demonstrate an increase in severity in her service-connected condition; and (2) what types of evidence or information were needed, or could be submitted to establish that claim. *Id.* 78a-79a. The court held that Simmons was entitled to have her case re-opened because the VA had not met its burden of proving that its violation of § 5103(a) had not prejudiced Simmons. *Id.* 80. The Federal Circuit affirmed, holding that the VA bears the burden of demonstrating that a VCAA § 5103(a) violation did not prejudice the claimant. *Id.* 56a-64a.

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[2] Petitioner James B. Peake, Secretary of Veterans Affairs, will be referred to herein as "the VA."

Petitioner Woodrow Sanders served in the U.S. Army from 1942 to 1945. In 1948, he applied to the VA for disability benefits, claiming that an eye condition from which he suffered was service-connected; he contended that he incurred the injury when a bazooka exploded near him in France in 1944, burning his face. The VA denied the claim in 1949. Sanders sought to re-open the claim 40 years later, but the VA again denied the claim in 2003. He appealed to the Veterans Court, claiming (among other things) that the VA had failed to provide the notice required by § 5103(a) because in writing to him regarding what additional information was needed, it had failed to indicate which portion of the additional information was to be provided by Sanders and which portion was to be provided by the VA.

The Veterans Court affirmed. Pet. App. 24a-38a. The court applied the framework it had previously established for determining whether a claimant has been prejudiced by the VA's violation of § 5103(a)'s notification requirements.[3] *Id.* 37a-38a. Accepting for purposes of the appeal that the VA had not complied

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[3] In a prior case, the Veterans Court had determined: (1) a violation of § 5103(a) is grounds for overturning a decision denying benefits only if the claimant has been prejudiced by the violation; (2) if the violation consists of a failure to notify the claimant regarding additional information necessary to substantiate the claim (as in Simmons's case), the burden falls on the VA to demonstrate an absence of prejudice; and (3) if the violation is of another types (*e.g.*, a failure to provide notice of who would ultimately be responsible for obtaining necessary information, the type of violation alleged by Sanders), the burden falls on the claimant to demonstrate that he was prejudiced by the VA's violation. *See Mayfield v. Nicholson*, 19 Vet. App. 103 (2005), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006).

with the § 5103(a) notification requirements, the court held that Sanders nonetheless was not entitled to relief because he had "not alleged any specific prejudice" caused by the VA's noncompliance. *Id.* 38a.

The Federal Circuit reversed. Pet App. 1a-21a. The court stated:

> [W]e hold that any error in a VCAA notice should be presumed prejudicial. The VA has the burden of rebutting this presumption. That said, this opinion does not displace the rule that the claimant bears the burden of demonstrating error in the VCAA notice, *see* U.S. Vet. App. R. 28(a), nor does it change the rule that reversal requires the essential fairness of the adjudication to have been affected. This opinion merely clarifies that all VCAA notice errors are presumed prejudicial and that the VA has the burden of rebutting this presumption.

Id. 19a. The court said that the VA can demonstrate that a claimant was not prejudiced by a VCAA § 5103(a) notice violation (*i.e.*, that "the purpose of the notice provision was not frustrated") by demonstrating, *e.g.*: "(1) that any defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice what was needed, or (3) that a benefit could not have been awarded as a matter of law." *Id.* 14a-15a. The Federal Circuit remanded the case to the Veterans Court "for proceedings consistent with this opinion." *Id.* 21a.

SUMMARY OF ARGUMENT

Neither § 5103(a) nor 38 U.S.C. § 7261(b)(2) (the provision on which the VA focuses much of its brief) directly addresses the issue raised by this case: which party bears the burden of proof on the issue of whether a claimant has been prejudiced by the VA's violation of the VCAA notice provision. *Amici* agree with Respondents that a fair reading of the entire statutory scheme governing VA claims leads to the conclusion that Congress intended to place on the VA the burden of demonstrating that its own errors in notifying a claimant did not prejudice the claimant.

Amici write separately to focus on the circumstances surrounding adoption of the VCAA in 2000. *Amici* submit that those circumstances make crystal clear that Congress intended to place the burden of proof on the VA. The VCAA was adopted in response to a Veterans Court decision, *Morton v. West*, 12 Vet. App. 477 (1999), which held in essence that the VA should not waste its resources by assisting veterans in developing their disability claims unless the claims were well-grounded. Congress responded by reversing the result in *Morton*; it adopted the VCAA to require the VA to assist *all* disability claimants in developing their claims, even those veterans whose initial submissions are deemed not well-grounded by VA personnel. Among the assistance measures mandated by the VCAA were the § 5103(a) notification requirements.

By asserting that veterans whose claims have been denied bear the burden of demonstrating that they were prejudiced by the department's violations of § 5103(a), the VA is essentially seeking to reinstate

Morton. After all, as the Federal Circuit explained in this case, a claimant is not prejudiced by a § 5103(a) violation if his claim is determined by a reviewing court to be not well-grounded in the law. Thus, as the VA would have it, a veteran has no basis for complaining to a reviewing court about the VA's failure to provide him with the assistance mandated by § 5103(a) unless *the veteran* can demonstrate that his claim was, indeed, well-grounded.[4] The VA even uses *Morton*'s precise rationale for excusing its failure to provide assistance: not providing such assistance allows it to conserve its resources for more deserving veterans. Pet. 25 (Remanding cases in which the VA has violated § 5103(a) "will divert resources from the adjudication of meritorious claims."). *Amici* respectfully submit that when Congress adopted the VCAA in 2000 to overrule *Morton*, it could not have intended to permit the VA to achieve the same result by reintroducing the discredited *Morton* rationale through the back door.

In support of its position that claimants ought to bear the burden of proof on the issue of prejudice, the VA points to 38 U.S.C. § 7261(b)(2), which provides that the Veterans Court, in reviewing appeals from VA claims determinations, should "take due account of the rule of prejudicial error." Noting the similarity of that language to language in the Administrative Procedure Act (APA), 5 U.S.C. § 706, the VA asserts that Congress

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[4] That rationale overlooks the fact that one reason a veteran may have difficulty in the Veterans Court carrying the burden of proof on the issue of well-groundedness is that the VA failed to provide the congressionally mandated assistance in developing his claims while those claims were still before the department.

must have intended that § 7261(b)(2) be interpreted in the same manner as § 706 (the APA's prejudicial error rule) has been interpreted. According to the VA, § 706 "has long been understood to place upon the party challenging an agency's action the burden of showing not only that the agency erred but also that its error was prejudicial." Pet. Br. 8.

The flaw in the VA's argument is that there is no such uniform understanding of § 706. Rather, the very cases cited by the VA demonstrate that the federal appeals courts have adopted a wide variety of approaches to assigning the burden of proof. In general, when a claimant has demonstrated to a court that an administrative agency has committed an error during the course of contested proceedings, the court is more likely to relieve the claimant of any duty to demonstrate prejudice when the natural effect of the error is to prejudice the claimant's substantial rights. The Federal Circuit correctly determined that the natural effect of a § 5103(a) violation is to deprive veterans (who often proceed without counsel) of the ability to marshal the evidence necessary to demonstrate their entitlement to benefits. Indeed, Congress adopted the VCAA precisely because it believed that the § 5103(a) notification requirements were an important means of assisting veterans in putting together their cases. Under those circumstances, § 706 case law does not support the VA's contention that the rule of prejudicial error requires courts to impose on claimants the burden of proof on the issue of whether they were prejudiced by the VA's own errors. Nothing in either § 706 or § 7261(b)(2) cuts against the evidence that Congress – in adopting the VCAA – intended to impose on the VA the burden of demonstrating that its errors did not prejudice a

claimant.

ARGUMENT

I. THE VCAA IMPOSES THE BURDEN OF PROOF ON THE VA

A. The Overall Structure of the Statutory Scheme Governing VA Claims Indicates That the VA Bears the Burden of Establishing That Its Errors Did Not Prejudice the Claimants

There can be little disagreement about one essential point: no federal statute *directly* addresses the burden of proof issue raised in this case. The VCAA, adopted in 2000, sets forth detailed requirements regarding information that the VA must convey to all claimants for veterans benefits, 38 U.S.C. § 5103(a), but it is silent regarding the consequences if the VA denies the claim after having failed to convey the required information. Congress adopted rules in 1988 governing judicial review of decisions by the VA denying veterans benefits; one of those rules, 38 U.S.C. § 7261(b)(2), provides that the Veterans Court shall "take due account of the rule of prejudicial error." Section 7261(b)(2) suggests that the Veterans Court, when determining whether an error committed by the VA during the course of administrative proceedings requires reversal of an administrative action, should take into account the degree of prejudice suffered by a claimant as a result of the error. But the provision is silent regarding who bears the burden of proof on the issue of prejudice. Indeed, the provision is written in the most

general of terms and does not indicate whether it has any application whatsoever to cases in which the VA failed to provide required information to claimants.

In the absence of any statutory provision directly addressing the burden of proof issue, the Court looks for guidance to the overall structure of the statutory scheme governing VA benefits. A reviewing court should not "confine itself to examining a particular statutory provision in isolation," because "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Food and Drug Administration v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132 (2000). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Such an examination in this instance confirms the Federal Circuit's conclusion that Congress intended to impose on the VA the burden of demonstrating that the claimant was not prejudiced by its failure to convey information that the VCAA requires be conveyed to all claimants.

Respondents Simmons and Sanders have both explained at length in their briefs why the overall structure of the statutory scheme governing VA benefits indicates that Congress intended to impose on the VA the burden of demonstrating that its VCAA violations did not prejudice the claimant. Simmons Br. 11-33; Sanders Br. 32-57. *Amici* will not repeat those arguments here. Rather, *amici* touch briefly on several points.

First, the entire veterans benefits system is structured so that at all stages of the proceedings, every benefit of the doubt is granted to veterans asserting claims for benefits. Congress has established a nonadversarial system "designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). The VA openly acknowledges its "'obligation to provide complete assistance to the veteran or other claimant in the development of a claim.'" Pet. Br. 23 (quoting S. Rep. No. 418, 100th Cong., 2d Sess. at 32-33 (1988)). The solicitude for claimants continues even after a claim has moved from the VA into the Veterans Court: factual findings in the veteran's favor are not reviewable in judicial proceedings, 38 U.S.C. §§ 7252(a), 7261(a)(4), and the Veterans Court in its decision-making is directed to take "due account" of the rule that the VA give the "benefit of the doubt" to the veteran. 38 U.S.C. § 7261(b)(1). In light of those provisions, it would be anomalous to hold that even when the VA has been shown to have conducted flawed administrative proceedings (by failing to comply with VCAA notification requirements), the VA's denial of benefits can be upheld regardless whether the VA provides any evidence that its error did not prejudice the claimant.

Second, as Respondent Sanders points out, claims for veterans benefits are on-the-record proceedings. Sanders Br. 42-43 (citing 38 U.S.C. § 7252(b)). Although claimants are highly likely to be prejudiced if the VA fails to fulfill its VCAA § 5301(a) notification obligations, evidence of such prejudice (*e.g.*, steps the claimants might have taken had they been informed of requirements that additional medical evidence be

submitted) is unlikely to be part of the administrative record. Thus, imposing on claimants the burden of proving to the Veterans Court that they have suffered prejudice will likely foreclose many veterans from obtaining relief even when they have demonstrated wholesale violations of § 5103(a).

Third, the VA should not be permitted to minimize the importance of the § 5103(a) notification requirements in ensuring that claimants have a fair opportunity to fully develop their claims. In adopting the VCAA, Congress mandated that each element of § 5103(a) notification be made at the *outset* of proceedings, *before* the regional office has made any initial determination regarding whether benefits should be granted. As the Federal Circuit reasoned:

> In passing the VCAA, Congress clearly viewed the claimant's participation as essential to processing his or her claim for VA benefits, and believed that the claimant should be notified which evidence he or she was responsible for providing and which evidence the government was responsible for providing. If Congress felt that such notice elements were not necessary to allow the claimant to effectively participate in the processing of his or her claim, then why would it have required them as part of notice pursuant to § 5103(a)?

Pet. App. 17a-18a. The court said that it would be improper to "excuse" the VA's failure to provide these essential notifications "without a showing that the defect had not frustrated the very purpose of the notice." *Id.* 18a.

Finally, *amici* note that the VA does *not* claim that the evidentiary burden imposed on it by the Federal Circuit would be overly difficult to meet. The absence of such a claim is understandable: the requirements of § 5103(a) are relatively straightforward, and thus the VA should not have difficulty ensuring proper notification in the vast majority of cases. The problem to date has generally involved the VA's failure to provide *any notice at all*. Once VA personnel are fully trained regarding the requirements of § 5103(a), it should not be overly difficult for them to determine the VA's evidentiary requirements for each type of claim that regularly comes before the VA. Under those circumstances, the only circumstance (discounting human error) under which the VA's initial notification could be deemed inadequate would be the highly unusual case in which the VA stiffened its evidentiary requirements following the initial VCAA notification. Moreover, the Federal Circuit did not mandate remand in every case involving VCAA notification error, but rather only in those cases in which the VA could not demonstrate that the claimant was unaffected by its error – thereby giving "due account" to the rule of prejudicial error. Pet. App. 19a.

B. The Circumstances Surrounding Adoption of the VCAA Confirm That Congress Intended to Impose the Burden of Proof on the VA

If additional evidence were needed, the circumstances adoption of the VCAA in 2000 make crystal clear that Congress intended to place the burden of proof on the VA.

As the VA recognizes, the VCAA was adopted in response to a Veterans Court decision, *Morton v. West*, 12 Vet. App. 477 (1999). *See* Pet. Br. 20-21. *Morton* involved a veteran (Morton) who claimed a variety of service-connected disabilities. VA personnel who initially examined him determined that the claims were not well-grounded; based on that determination, the VA decided that it would not assist the veteran in developing his claim. Although a statute in effect at that time (38 U.S.C. § 5107(b) (1991)) arguably required the VA to provide assistance to all claimants, earlier decisions had held that the statute required no more than that assistance be provided to claimants whose claims were well-grounded.

The sole claim raised by Morton in his appeal to the Veterans Court was that the VA had erred in declining to assist in the development of his claim. Because Morton was foreclosed by earlier decisions from asserting a *statutory* right to assistance, he sought instead to rely on VA regulations that arguably created such a right. The VA *denied* that its regulations created a right to assistance among those who filed claims deemed not well-grounded by VA officials. The Veterans Court went one step further: it held that, in light of 38 U.S.C. § 5107(b) (1991), the VA was not even authorized to assist in the development of a claim determined by the VA not to be well-grounded. 12 Vet. App. at 485-86.

Congress passed the VCAA in response to the *Morton* decision, for the purpose of overturning it. *See Mayfield v. Nicholson*, 499 F.3d 1317, 1319 (Fed. Cir. 2007). But the VCAA was not simply a rebuke to the Veterans Court; it was also a rebuke to the VA, which

had insisted in *Morton* that it was not *required* to provide assistance to claimants whose claims were deemed not well-grounded. The VCAA now requires the VA to assist *all* disability claimants, even those veterans whose initial submissions are deemed not well-grounded by VA personnel. Among the assistance measures mandated by the VCAA were the § 5103(a) notification requirements.

By asserting that veterans whose claims have been denied bear the burden of demonstrating that they were prejudiced by the department's violation of § 5103(a), the VA is essentially seeking to reinstate *Morton* and resurrect the VA policy that Congress rebuked when it adopted the VCAA. That is so because, under the standards established by the Federal Circuit, a claimant is not deemed prejudiced by a § 5103(a) violation if it is determined that his claim was not well-grounded in law. Pet. App. 15 (listing a finding that "a benefit could not have been awarded as a matter of law" as one of three bases for determining that a claimant has not been prejudiced). Thus, if the VA has its way, a claimant will be denied recourse for a violation of his § 5103(a) notification rights unless he can affirmatively demonstrate that his claim was, indeed, well-grounded.[5] But that is precisely the holding of *Morton*, a holding that Congress repudiated when it adopted the VCAA. The VA successfully resisted Mr. Morton's assertion

[5] That rationale overlooks the fact that one reason a veteran may have difficulty in the Veterans Court carrying the burden of proof on the issue of well-groundedness is that the VA failed to provide the congressionally mandated assistance in developing his claims while those claims were still before the department.

that it should have helped him develop his claims by asserting that it was under no obligation to assist with the development of claims determined not to be well-grounded.

The VA even uses *Morton*'s precise rationale for excusing its failure to provide assistance: not providing such assistance allows it to conserve its resources for more deserving veterans. Pet. 25 (Remanding cases in which the VA has violated § 5103(a) "will divert resources from the adjudication of meritorious claims."). *Amici* respectfully submit that when Congress adopted the VCAA in 2000 to overrule *Morton*, it could not have intended to permit the VA to achieve the same result by reintroducing the discredited *Morton* rationale through the back door.

II. SECTION 7261(b)(2) DOES NOT SUPPORT THE VA BECAUSE THERE IS NO UNIFORM UNDERSTANDING REGARDING ALLOCATION OF THE BURDEN OF PROOF UNDER THE RULE OF PREJUDICIAL ERROR

In support of its position that claimants ought to bear the burden of proof on the issue of prejudice, the VA points to 38 U.S.C. § 7261(b)(2), which provides that the Veterans Court, in reviewing appeals from VA claims determinations, should "take due account of the rule of prejudicial error." Noting the similarity of that language to language in the Administrative Procedure Act (APA), 5 U.S.C. § 706, the VA asserts that Congress must have intended that § 7261(b)(2) be interpreted in the same manner as § 706 (the APA's prejudicial error rule) has been interpreted. According to the VA, § 706

"has long been understood to place upon the party challenging an agency's action the burden of showing not only that the agency erred but also that its error was prejudicial." Pet. Br. 8.

The flaw in the VA's argument is that there is no such uniform understanding of § 706. Rather, the very cases cited by the VA demonstrate that the federal appeals courts have adopted a wide variety of approaches to assigning the burden of proof. Given that variety of approaches, there is no basis for the VA's assertion that Congress, when it adopted § 7261(b)(2), must have intended that provision to incorporate some such uniform understanding.

Numerous federal appellate coourts have been unwilling to impose on the party that has demonstrated significant administrative error the additional burden of demonstrating that it was prejudiced by the error. Instead, they have limited application of the doctrine of harmless error to cases in which the irrelevance of the error to the final administrative action is "clear." As the Veterans Court noted in *Mayfield*:

> There is also considerable APA § 706 caselaw to the effect that "the doctrine of harmless error . . . is to be used only 'when a mistake of the administrative body is one that clearly has no bearing on the procedure used or the substance of decision reached.'" *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979) (quoting *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 466 (D.C. Cir. 1967)); *accord Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444-45 (5th Cir. 2001); *McLouth Steel Prod. Corp. v. EPA,*

> 838 F.2d 1317, 1324-25 (D.C. Cir. 1988); *Buschman v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982); *Evans v. Sec'y of Defense*, 944 F. Supp. 25, 29 (D.D.C. 1996).

Mayfield, 19 Vet. App. at 114-15.

For example, in one of the cases relied on by the VA, *Friends of Iwo Jima v. National Capital Planning Comm'n*, 176 F.3d 768 (4th Cir. 1999), the plaintiffs cited two minor procedural errors (regarding the notice provided for two of many meetings) as the basis for overturning informal administrative action (a decision to site an Air Force memorial at a specific location) that followed a years-long administrative process. Given that the plaintiffs (who wanted the memorial sited elsewhere) had not participated in the administrative proceedings and thus would not have attended the two meetings even if the notice for those meetings had been proper, and given that the procedural requirements at issue played such a minor role in the overall administrative process leading to the eventual citing decision, the Fourth Circuit deemed it clear that the plaintiffs had not been prejudiced by the procedural errors. 176 F.3d at 774. It was within that context that the Fourth Circuit stated that the plaintiffs could not prevail unless they came forward with evidence that they had actually been prejudiced by the procedural errors. *Id.*[6]

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[6] Other cases cited by the VA merely mentioned burden of proof issues in passing; who bore the burden of proof was not at issue in those cases. For example, the D.C. Circuit determined in *American Coke and Coal Chems. Inst. v. EPA*, 452 F.3d 930 (D.C. Cir. 2006), that the EPA had adopted challenged rules in accord

When, as here, a party is not challenging informal agency action but rather is challenging an adjudicative decision reached after an on-the-record proceeding, there is much more reason to be concerned by an agency's failure to abide by procedural requirements that concededly were imposed by Congress for the very purpose of protecting a party to the adjudication. Whenever, as here, an "error is of such a character that its natural effect is to prejudice a litigant's substantial rights," courts have imposed on the party seeking to sustain a challenged decision the burden of demonstrating an absence of prejudice. *Kotteakos v. United States*, 328 U.S. 750, 760 (1946). This court has tended to impose on the challenger the burden of demonstrating that he has been prejudiced by errors committed below only when the errors were merely "technical" in nature. *O'Neal v. McAninch*, 513 U.S. 432, 439 (1995).

The VA concedes the existence of numerous appeals court decisions in which the court did not impose on the challenger any burden of demonstrating prejudice. *See, e.g.,* Pet. Br. 16 n.4 (citing *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003)). But the VA attempts to distinguish those cases by asserting that "they stand for the proposition that denial of [certain procedural] rights is prejudicial even if there is no evidence of an effect on the outcome of the proceeding." *Id.* The VA asserts that "[t]hat proposition has no application here, since there is no dispute that a VCAA notice error is prejudicial only if it has some effect on

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with all procedural requirements, and thus it had no occasion to consider whether those challenging the rules had been prejudiced by any errors committed in connection with their adoption.

the determination of benefits." *Id.*

The VA's effort to distinguish *Sprint* and similar cases is unavailing. They illustrate that all § 706 cases exist on a continuum, with courts demanding that a challenging party provide less and less evidence of prejudice the more it appears that the "natural effect" of an administrative error is to cause prejudice. Cases such as *Sprint* are not different in kind from Respondents' claims; rather, they involve errors whose natural tendency to cause prejudice is sufficiently large that they create an irrebutable presumption of prejudice. *See also Chamber of Commerce of the United States v. SEC,* 443 F.3d 890, 904 (D.C. Cir. 2006); *Sugar Cane Growers Co-op of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002); *McLouth Steel Prods.*, 838 F.2d at 1324. When, as here, the agency's error has a strong natural tendency to cause prejudice but the tendency is not quite as strong as in case such as *Sprint*, it is appropriate to presume prejudice but to provide the agency with an opportunity to rebut that presumption.

Because there is no uniform understanding that the rule of prejudicial error imposes on the party alleging error the burden of proving prejudice, there is no reason to conclude that Congress adopted that understanding when it adopted 38 U.S.C. § 7261(b)(2). Accordingly, § 7261(b)(2) does not overcome the evidence (cited above) indicating that Congress intended, when it adopted the VCAA, to impose on the VA the burden of demonstrating that its failure to provide § 5103(a) notification to a claimant did not prejudice the claimant's rights. The VCAA did not overrule § 7261(b)(2); rather, it addressed a topic (burden of proof) that simply was not a focus of the

earlier statute.

Amici also note that affirming the decision below should have minimal impact on the administrative process. This is not an instance in which overturning administrative action will prevent the government from implementing a program that has been years in the planning. Nor is it an instance in which a decision adverse to the government will require it to pay out funds to a claimant. All the Federal Circuit has done is to require the VA to take another look at a relatively small number of cases. Given that in each of those cases the VA has failed to follow its statutory mandate and the claimants are veterans (a group that Congress has made clear is entitled to special protections), it is not asking too much to request that the VA take such second looks.

CONCLUSION

Amici curiae respectfully request that the Court affirm the decision of the U.S. Court of Appeals for the Federal Circuit.

Respectfully submitted,

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Dated: October 21, 2008

Counsel wish to thank DeShun Harris, a student at Texas Tech University Law School, for her assistance in preparing this brief.